No. 82-1551

In The

Supreme Court of the United States

October Term, 1982

IN RE: BEVERLY HILLS FIRE LITIGATION

MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, Deceased, Individually and on Behalf of all Others Similarly Situated as a Class,

Respondents,

vs.

BRYANT ELECTRIC COMPANY, Et Al.,

Petitioners.

On Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

By Order dated July 21, 1982, the United States Court of Appeals for the Sixth Circuit reversed and remanded for new trial a Judgment entered February 21, 1980 in favor of defendants-petitioners as amended by Order dated April 10, 1980 of the United States District Court of Kentucky at Covington. Upon Petition for Rehearing filed by defendants-petitioners, the United States Court of Appeals for the Sixth Circuit reaffirmed its decision by Order dated December 23, 1982.

The decision of the Sixth Circuit Court of Appeals to reverse and remand was based upon prejudicial juror misconduct consisting of an "improper experiment and its use in the jury deliberations" (Petitioner's Appendix, p. 52). The facts upon which the Court relied in reaching this determination which were characterized by the Court as "too compelling and too fraught with potential for prejudice to be ignored" (Petitioner's Appendix, p. 52) are as follows.

Subsequent to a verdict being rendered in favor of defendants-petitioners in the Beverly Hills Fire Litigation, a letter was received by *The Kentucky Enquirer,* a local newspaper, wherein the writer of the letter identified himself as a member of the Beverly Hills Fire Litigation jury. The text of this letter is set forth in the opinion of the Sixth Circuit Court of Appeals at pages 16 through 18 of the Petitioner's Appendix. Within this letter, the writer discussed various aspects of the trial, commenting upon evidence produced during the trial, trial procedure and most importantly, an independent experiment conducted by the juror in his own home dealing with the subject matter of the trial. The juror, in his letter, specifically stated:

> I went home one night, pulled about 15 outlets from their boxes and wanted to see how loose the connections were.
>
> I could not turn any of the screws one bit. My home is wired with [aluminum]. I bought the house 11 years ago in 1969. The plaintiffs talk about stress relaxation and creep which would cause the [aluminum] wire to loose its torque after a short period of time. My outlets are still tight after 11 years of use. How come these are not loose? (Petitioner's Appendix, p. 18).

Upon being informed of the juror's letter, and the contents of the letter, the Trial Court agreed to conduct an examination of the jurors to determine whether or not an experiment was in fact conducted by a juror and whether any additional jurors had knowledge of such. The examination of the jurors was held on March 7, 1980, in the presence of counsel for plaintiffs and defendants. The examination was conducted by the Court, each juror being questioned individually and out of the presence of all other jurors, and a record was made of the examination.

During the examination, Juror John Vories admitted to having conducted an experiment in his home during the course of the trial. Mr. Vories stated that during the first part of the trial, he went home and checked the aluminum wired outlets in his home to determine whether his outlets were evidencing any of the symptoms which had been discussed during trial testimony. Mr. Vories' home had been built in 1969 and aluminum wiring had been installed in his home at that time. Mr. Vories further stated that he had discussed the fact that he had inspected the aluminum wired outlets in his home with other jurors (Appendix, pp. 34-39). The examination of the additional jurors indicated that Mr. Vories had in fact discussed his experiment with other jurors, both during trial and during deliberations. Juror Burton stated that Mr. Vories discussed the experiment with him during the early stages of the trial (Appendix, pp. 29-30). Juror Kremer testified that Mr. Vories spoke with her of his experiment during deliberations (Appendix, pp. 41-43). Juror Knapp recalled that Mr. Vories had discussed his experiment with her prior to deliberations, during either an early or middle phase of the trial (Appendix, pp. 43-45). Juror Ziegler

testified that Mr. Vories had discussed his experiment during trial and had commented upon it in the presence of the jurors as a whole and that possibly all 18 jurors were present at the time of the discussion (Appendix, pp. 48-49).

In reviewing the foregoing facts, the Court of Appeals determined that,

> Upon a careful examination of the record and the applicable law, we regretfully conclude that the jury verdict was impermissibly tainted by what can only be characterized as an improper juror experiment (Petitioner's Appendix, p. 19).

SUMMARY OF ARGUMENT

In summary, plaintiffs-respondents argue that defendants-petitioners' allegation that the Sixth Circuit Court of Appeals based its decision to reverse and remand solely upon the existence of an anonymous letter written by a Beverly Hills Fire Litigation juror, is erroneous. The Sixth Circuit reviewed the record as a whole, which record included the sworn testimony of jurors evidencing juror misconduct as well as said letter, which letter was merely repetitive of the sworn testimony of a juror. Plaintiffs-respondents further argue that defendants-petitioners had no fundamental right to confront and cross-examine discharged jurors during the examination of said jurors conducted by the Trial Court and that even if defendants-petitioners did have such a right, defendants-petitioners waived that right by failing to request that the Trial Court permit them to conduct cross-examination or

in the alternative by failing to object to their inability to conduct cross-examination.

ARGUMENT

Defendants-petitioners have presented for review the issue of "Whether the Court of Appeals may, consistent with principles of due process, rely upon an unidentified, unverified, anonymous letter written to a newspaper as a basis for reversing the decision of the District Court". Despite the foregoing being stated as the issue for consideration, the majority of defendants-petitioners' argument addresses a separate issue, distinct from the foregoing and not formally identified as an issue by defendants-petitioners. Further, the issue is one which was not previously raised on appeal by defendants-petitioners. This issue presents the question of whether or not the defendants-petitioners had a fundamental right to cross-examine the discharged jurors during the examination of the jurors conducted by the Trial Court in order to determine whether or not one of the jurors was the author of the letter written to the local newspaper. It is plaintiffs-respondents' position that defendants-petitioners had no right to cross-examine the discharged jurors, during their examination by the Trial Court, and that the procedure for examination of jurors implemented by the Trial Court was correct and in accordance with the procedure set forth and required by the Sixth Circuit Court of Appeals. Even if defendants-petitioners did have such a right, defendants-petitioners waived their right when they failed to

request permission to cross-examine the jurors or in the alternative when they failed to object to their inability to cross-examine. In conjunction therewith, defendants-petitioners did not request that the Trial Court ask this question of the jurors. Defendants-petitioners did submit questions to the Court for purposes of the juror examination for the Court's use in conducting the examination, but the defendants-petitioners did not include, probably purposefully, a question addressing authorship of the letter among these.

The examination of the discharged jurors was ordered by the Trial Court to take place on March 7, 1980. In its Order dated March 5, 1980, the Trial Court stated that the examination would be carried out in accordance with juror examination procedures dictated by the Sixth Circuit Court of Appeals in *Krause v. Rhodes,* 570 F. 2d 563 (6th Cir. 1977). The procedure to be followed, in *Krause v. Rhodes, supra,* is set forth in the following discussion:

> . . . It was error for the trial court to determine ex parte and without any personal interrogation that a juror who had been threatened and assaulted and told that his home would be blown up could continue to serve, unaffected by these incidents. The threatened juror should have been questioned by the court to hear his version of the reported incidents and to learn whether he had discussed them with other jurors, including the possibility that he had disclosed the way in which his assailant was attempting to cause him to vote. Unless counsel agreed to an in-camera interrogation, they were entitled to be present and a record should have been made of the proceedings. (at page 569).

In accordance with the above, the Trial Court personally examined the jurors, with counsel present and a rec-

ord was made of these proceedings (Appendix, pp. 1-67). Counsel for defendants-petitioners were present during the examination and at no time objected to the manner in which the Trial Court planned to conduct the examination nor to the Trial Court being the examiner of the jurors. Neither did counsel for defendants-petitioners request that counsel be permitted to question the jurors instead of the Court nor did counsel request that they be permitted to question the jurors subsequent to the Court's questioning. Counsel for defendants-petitioners, for reasons that now become obvious, did not request that the Court ask even one of the jurors whether or not he or she authorized the letter, either prior to the beginning of the examination, during the examination or subsequent thereto. A review of the record of the proceedings (Appendix, pp. 1-67) evidences each of the above-cited failures of defendants-petitioners. Counsel for defendants-petitioners did submit to the Trial Court a listing of questions which defendants-petitioners requested the Court to ask each juror. The question requested in defendants-petitioners' pleading entitled "Memorandum Regarding Juror Inquiry," which has been included within the Appendix, is as follows.

> In light of these cases, defendant submits that this Court should question each juror concerning what information was passed to each individual juror, whether any discussions were had, the times of such discussions, and whether any of these discussions occurred during the jury's deliberations. In addition, if there were discussions, defendant submits that this Court must question each juror as to the substance of each discussion, as only then can the alleged prejudicial effect be shown. (at p. 6).

Inasmuch as the Trial Court conducted the examination of jurors in accordance with the correct procedure

required by the Sixth Circuit Court of Appeals as set forth in *Krause v. Rhodes, supra,* and inasmuch as defendants-petitioners failed to object to such procedure, failed to request that the Court examine the jurors as to the authorship of the letter, defendants-petitioners' argument alleging a denial of due process must fail. *Brookhart v. Janis,* 384 U. S. 1 (1966) and *Re Probate Of The Will Of Lillian H. White, Deceased,* 2 N. Y. 2d 309 (1957).

In support of their arguments alleging a denial of due process, defendants-petitioners have cited to a number of cases the majority of which address the issue of the right to cross-examine adverse witnesses. In each of the cited cases, however, it was held that the right to conduct cross-examination of adverse witnesses exists in instances wherein there is a possibility that without such cross-examination liberty, property, or livelihood rights would be jeopardized. Inasmuch as defendants-petitioners were not in a situation wherein their liberty, property or livelihood rights were at issue, the cases cited by defendants-petitioners should be deemed inapplicable. The cited cases are very briefly discussed hereinafter.

Alford v. United States, 282 U. S. 687 (1931) involved a criminal prosecution for using the mails to defraud. This Court held that the defense should be permitted to conduct reasonable cross-examination of a former employee of the defendant who testified to uncorroborated conversations of the defendant, of a damaging character. *Barber v. Page,* 390 U. S. 719 (1968) was a criminal case wherein the determination of the Court was that a defendant should have the right to cross-examine a witness unless the witness was "unavailable" and that failure to cross-examine at a preliminary hearing does not consti-

tute a waiver of the right of confrontation at a subsequent trial. *Bell v. Burson*, 402 U. S. 535 (1971), cited by defendants-petitioners, stands for the proposition that before a state may deprive an individual of his license and registration, it must provide a procedure for determining the question of whether there is a reasonable possibility of a judgment being rendered against him. *Brookhart v. Janis*, 384 U. S. 1 (1965) holds that a defendant's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine adversary witnesses could not be waived by his counsel without the defendant's consent. It was determined in *Carter v. Kubler*, 320 U. S. 243 (1943) that it was error for an examiner in bankruptcy to personally investigate and evaluate property outside of and independent of hearings which were conducted. In *Fuentes v. Shevin*, 407 U. S. 67 (1972), this Court held that it was a denial of due process to seize goods and chattels without a hearing. In *Goldberg v. Kelly*, 397 U. S. 254 (1969) it was held that a pre-termination evidentiary hearing is necessary to provide a welfare recipient with procedural due process and that the recipient is to have the right to cross-examine adverse witnesses at said hearing. *Greene v. McElroy*, 360 U. S. 474 (1959) held that in an administrative hearing regarding revocation of a security clearance, an opportunity to confront and cross-examine adverse witnesses is to be provided inasmuch as deprivation of livelihood is at stake. *In Re Oliver*, 333 U. S. 257 (1948) involved secret contempt proceedings and a secret sentencing. This Court held that a defendant has the right to be given reasonable notice of the charge, the right to examine witnesses against him, the right to testify in his own behalf and the right

to be represented by counsel. *Pointer v. Texas,* 380 U. S. 400 (1964) was a criminal case in which it was held that the right granted to an accused by the 6th Amendment to confront witnesses against him includes the right of cross-examination, which is a fundamental right essential to a fair trial. In *Reilly v. Pinkus,* 338 U. S. 269 (1949), the Court held that in a fraud-order proceeding, it was error not to permit the defendant to cross-examine the government's witnesses as to statements contained in medical books for the defendant was to be given a reasonable opportunity to cross-examine witnesses. *Smith v. Illinois,* 390 U. S. 129 (1968) holds that the defendant has the right to cross-examine a principal prosecution witness as to his correct name and address; the case involved the illegal sale of narcotics. *Sniadach v. Family Finance Corp.,* 395 U. S. 337 (1969) involved a prejudgment garnishment statute which did not provide for notice or hearing. This Court held that the statute violated procedural due process inasmuch as there was a taking of property involved and therefore notice and hearing were required. In *Snyder v. Massachusetts,* 291 U. S. 97 (1934), the accused was denied permission to attend a view of a premises. The Court held that the denial to attend was not a violation of due process. Finally, *Willner v. Committee on Character and Fitness,* 373 U. S. 96 (1963), held that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.

Addressing now defendants-petitioners' stated issue of whether or not the Sixth Circuit Court of Appeals erroneously relied upon a letter as a basis for reversing the decision of the Trial Court, plaintiffs-respondents argue

that the Sixth Circuit certainly did not base its decision solely upon the said letter, as has been represented by defendants-petitioners. The Court states clearly in its opinion that the Court relied upon the *entire record* before it in determining that a reversal was necessary (Petitioner's Appendix, p. 19). As has previously been discussed by plaintiffs-respondents in the foregoing Statement of the Case, the record includes the sworn testimony of jurors who verify that the experiment related in the letter did take place, that information regarding the experiment was discussed by jurors both during trial and during deliberations and that the experiment was conducted by Juror Vories. The Court of Appeals clearly did not take this sworn testimony into account in reaching its determination, as is evident from the Court's statement at page 24 of the Petitioner's Appendix, at note 11,

> Because the juror discussed his findings with other jurors, we need not decide whether an uncorroborated claim that an experiment was conducted, which potentially could be used merely as a tool to manipulate the verdict, would support a mistrial.

(See also Petitioner's Appendix, pp. 15, 16, 17, 23). Therefore, the true state of the facts is not as represented by defendants-petitioners. The testimony reviewed by the Court of Appeals more than adequately supported the Court's decision to reverse and remand and the Court's decision was very much in line with its previous decisions on the subject of juror misconduct, as set forth in *Womble v. J. C. Penney,* 431 F. 2d 985 (6th Cir. 1970), *Stiles v. Lawrie,* 211 F. 2d 188 (6th Cir. 1954) and *Aluminum Company of America v. Loveday,* 273 F. 2d 499 (6th Cir. 1959), cert. denied, 363 U. S. 802 (1960). Any argument to the contrary is lacking in substance and has no basis in fact.

CONCLUSION

Rule 17 of the Supreme Court Rules states that there must be special and important reasons presented before the Court will agree to grant review on certiorari. In the instant matter, the issue presented by defendants-petitioners is neither special nor important; the issue is actually moot.

The decision of the Court to reverse and remand cannot be challenged, for the record undisputedly contained corroborated sworn testimony admitting jury misconduct both during trial and during deliberations. In actuality, the review of defendants-petitioners issued by this Court would serve no purpose other than to delay the date upon which plaintiffs-respondents may receive the new trial to which plaintiffs-respondents are unquestionably entitled.

Plaintiffs-respondents respectfully request that defendants-petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(p. 685)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

In re:

BEVERLY HILLS FIRE LITIGATION

Before:

The Honorable Carl B. Rubin, Chief Judge,
United States District Court for the
Southern District of Ohio
(sitting by designation).

TRANSCRIPT OF PROCEEDINGS

(Chambers Conference.)

(Examination of Jurors)

Cincinnati, Ohio
March 7, 1980 — 9:00 a.m.

Robert I. Crawford, Official Court Reporter
203 Post Office Building, Cincinnati, Ohio — (513) 241-4697

(p. 686) The Court: Gentlemen, do come in and sit down, please. If your colleagues want to come in for this part of it, I will be happy to talk to them, but I want it clearly understood what I am doing and why.

Gentlemen, do come in for a moment. Do sit down. I want to explain what it is I am doing and why. My goodness, you did bring—Those that can sit down should try to. Good morning.

Mr. Cassis: This is a little more spacious.

The Court: This is indeed, which is part of the reason I wanted to do it here. Do sit down. Let me explain what it is I propose to do this morning and the reason why I feel it important to limit the number of people here.

I am simply doing this as a fact-finding procedure. I don't think I should be required to rule on a motion based upon what the newspapers have said, and at this moment my only information is what I have read in the paper.

I intend to ask each of these jurors, for my own purposes, for facts, whether or not there was a discussion about the—well, in fact, whether a juror did investigate his own aluminum wiring, whether that was part of their discussion, and then I am going to ask if they recognize this document which is Reconstruction of a Tragedy.

Now, I read the cases as well as you have. I am not going to ask them anything about their deliberations; and (p. 687) for purposes of finding out what did occur I felt that it was appropriate for me to interrogate them rather than to rely upon at best an affidavit of somebody who says that's what the juror told him.

Now, my feeling is that if I did this in an open courtroom or if I did it with this number of counsel present, it has a potentially intimidating effect. I don't want these jurors to tell me what they think I want to hear, and this is the danger of it.

Physically, I propose to have the four attorneys that will be here to sit in the back, away. They are not going to interrogate the jurors themselves. I am going to have the juror seated across from me and I will ask them ques-

tions to find out what the facts are in this matter. That's my purpose, and I think you are entitled to know.

It had not occurred to me that everybody was going to be back here from out of town, but I don't see any reason why this thing should be expanded beyond what it is.

Mr. Goodman: Your Honor?

The Court: Yes.

Mr. Goodman: What do you propose to do with the record?

The Court: That's a good question, Mr. Goodman. Originally I thought the appropriate thing to do with the record was to seal it simply because this is a discharged (p. 688) jury. I don't know that if they said to me, you know, "We are not even going to talk to you," I don't think I could force them to do it.

My feeling was I wanted whatever decision I made to be reviewable, and I thought that the appropriate thing to do was to seal this, give it to the Sixth Circuit in the event an appeal is taken and they can look at it. But I don't have any strong feelings about it. If you gentlemen would rather that this become part of the record in this case or if you want copies of it, I have no strong feelings. What is your preference?

Mr. Stein: The question which that leads to in my mind, your Honor, is, instead of an answer, it's another question. What do you envision in terms of briefing or arguments? Because it's impossible—It's difficult for those two who sit here as observers to remember well enough for briefing and argument purposes. It's impossible for those who will not have been here to participate

meainingfully (sic) in a briefing or argument process if there are to be briefs and/or arguments.

The Court: Well, let me ask you this. Supposing I limited distribution of this to counsel, that any counsel can have a copy and that I still seal the copy in the record for use of an appellate court. As I say, I have no feeling—

Mr. McCracken: I think that's reasonable because (p. 689) I don't think any of us want any reporter to get this transcript and then go cross-examine and impeach the jury again, because I think the jury has been harassed enough.

The Court: I agree with you, Mr. McCracken.

Mr. McCracken: There may be inconsistent statements and, if there are, I don't think they should be subjected to any more criticism.

The Court: Well, frankly, the basis of my order that day that they were not to be interrogated was for that precise reason. I don't believe a juror should be required to justify his decision, and I had hoped to avoid harassment. The fact is the law is contrary and I do not have a right I recognize now to prevent the newspapers from contacting these people. I do propose to tell the jurors that they are not obligated to talk to any person, and I do intend to impose the Southern District of Ohio rule that lawyers may not because, I agree with you, I do not intend these jurors be harassed.

O. K. If that's agreeable, I will do it that way.

Mr. Gilligan: Your Honor, one question with regard to the memorandas that we will be writing about this.

The Court: Yes.

Mr. Gilligan: Should we hold that in camera also and just exchange it between counsel for the plaintiffs (p. 690) and the aluminum?

Mr. McCracken: I think that would be—

Mr. Gilligan: When we file it, file it just with your Honor so that your Honor can hold the original in camera.

Mr. Chesley: And then not file it with the attorneys. Naturally we will be referring to the transcript and you will be back into the same transcript.

The Court: I will give you gentlemen any odds anybody cares to book that the gentlemen are going to get somehow a copy of this but, you know, I can only take the steps that I think are appropriate.

Mr. McCracken: I think we should make the effort not to.

The Court: O. K. I would like not to. I really don't want to see this case on the front page of the paper. It's over and done with and I think this is not to be encouraged.

Mr. Measle: Is there some way you can impose some sort of a gag rule on us as attorneys?

The Court: Let me put it this way, to the attorneys I am going to damn well try. I think I have some disciplinary rights that I would impose on lawyers. I think it is wrong for lawyers to interrogate jurors. I don't think that they should be subjected to your advocacy.

Mr. Chesley: Your Honor, I don't believe anybody (p. 691) is even making a hint that any lawyer has contacted any jurors.

The Court: I know that, but I want to retain it.

Mr. Measle: Your Honor, what you are going to put in the record you are going to distribute just to the attorneys, I understand?

The Court: That's right.

Mr. Measle: Is there any way that we can keep it that way? Do you have any remedy for it, if I might ask that?

The Court: Well, let me put it this way. I will take a dim view of any lawyer who deliberately gives this to the press.

Mr. Measle: That's what I wanted to know.

The Court: And if it may be that three years from now it suddenly dawns on them he has never won another case in my room, you know that would be just coincidence. (Laughter.)

O. K., but so far as going beyond that point, I am saying to you gentlemen I don't think you should do it. I think it's wrong. I don't believe that this is a matter for public entertainment. I am perfectly content to rule on your motion; whichever way I rule somebody is going to take an appeal. I think they ought to know, the appellate court ought to have available to them factual information (p. 692) rather than newspaper accounts or affidavits that somebody presented. That's really—

Mr. Johnson: Your Honor, the factual information that you are seeking to elicit by calling the jurors back—and I have gotten all this through copies of newspaper articles myself—is whether or not a juror tested or looked at—

The Court: Yes.

Mr. Johnson: —aluminum receptacles in his home.

The Court: There are two problems, Mr. Johnson, that I understand from the newspapers. Number 1, it is said that a juror went to his home and unscrewed I think 16 receptacles, tested the connections, the binding head screw connections with aluminum wire and found they were all tight and allegedly came back and reported that to the jury. O. K.

The second thing is that a juror indicated that he spent some of the time in the jury deliberations reading this document Reconstruction of a Tragedy and, while it isn't critical to our discussion, I would like to know whether that is a fact.

And my examination of the record, gentlemen, indicates a very simple situation. The plaintiffs simply neglected to object when this was offered.

Mr. Chesley: Your Honor, we would take issue—

(p. 693) The Court: Well, Mr. Chesley, I am not going to debate—

Mr. Chesley: I understand, but we would take issue for the record, your Honor. We have a problem with the record. Right now the record is blank as to whether or not any copy of Reconstruction of a Tragedy was admissible or not admissible.

The Court: No, Mr. Chesley, that isn't the state of the record. The state of the record is that there were two or more separate offerings of this document under two different numbers. The list of all numbers was given to

you in advance of our meeting on Monday. You picked up the number 13,000 and something and raised an objection. You did not pick up the other number. It was there on the list given to you, and the plaintiffs simply were silent.

Mr. Chesley: Your Honor, that was not my point.

The Court: Well, that's my point and that's why I am saying this parenthetically, that so far as I am concerned there was—

Mr. Chesley: But as we looked at the record today, even 13,000 and whatever—13, is that the number?

The Court: I think it is 13,013.

Mr. Chesley: It is not even noted in the record as being excluded because this was not excluded.

The Court: It doesn't matter. It was excluded (p. 694) orally and counsel were so advised.

Mr. Chesley: But, your Honor, for purposes of the record, and I don't want to debate it with the Court—

The Court: All right.

Mr. Chesley: For purposes of the record, I would like to have it indicated that the ruling of the Court was as to 13,013, or that copy 13,000—

The Court: That's right.

Mr. Chesley: —that it was to be excluded from going to the jury.

The Court: No question about it, Mr. Chesley. There were three documents, and the record reflects that they were given to me on Monday at the end of our conference and I think they are identified by number. There was

this; there was something called the Burndy Report and there was a third one—

Mr. Chesley: General Electric Communication.

The Court: O. K. And as counsel you were called Monday afternoon that these, whatever the disposition was —At least two of them, as I recall, were not held admissible. But the fact is that at the meeting on Monday, after counsel had a list by number of all exhibits, included in that list was the other document Reconstruction of a Tragedy, by number; and when the plaintiffs were asked, "Do you have any objection to this list?" there was no response.

(p. 695) Mr. Chesley: Your Honor, I don't want to debate—

The Court: All right.

Mr. Chesley: —but there is one point that I do want to clear up for the record. We were not notified until 9:00 a.m. of Wednesday morning as to the Court's ruling relative to Reconstruction of a Tragedy, if it's 13,003, and the other two documents. That's when we were notified. I made a phone call to the clerk on Wednesday morning.

The Court: It can't be Wednesday morning.

Mr. Chesley: Yes, your Honor, the day they started deliberation.

The Court: Well, if this has to be done by affidavit, it will, but I think you were notified Monday afternoon.

Mr. Chesley: No, your Honor, we were not.

The Court: All right. The fact is that document was not admitted into evidence and the jury didn't see it, pe-

riod. They didn't see it. They saw the same document under a different number which you didn't object to.

All right. Gentlemen, I am not going to try the issue at this point. I am simply saying in response to your question, Mr. Johnson, I would like to know whether or not this was a subject of discussion. Now, those are the two points that have been brought to my attention.

(p. 696) Mr. Stein: Your Honor, may I inquire when you question the juror who supposedly checked the receptacles in his house—

The Court: Right.

Mr. Stein: —may we know at this point what questions you intend to ask him? Will it be limited simply to—

The Court: O. K., probably just that question, Mr. Stein, "Did you check the receptacles in your home?" and if the answer is yes, "Did you advise other jurors of the results?" That's all.

Mr. Chesley: Your Honor, we would like to go one step further as to when this occurred.

The Court: I think that may be of some importance. I may ask him whether he did it before deliberations or during deliberations.

Mr. Chesley: And when he advised the jurors.

Mr. Johnson: My concern about going into that is anyone who had aluminum wiring at home and listened to Jesse Aronstein and didn't check them would probably be thinking he is sitting on a time bomb. I just don't see the significance.

The Court: Mr. Johnson, I don't know that there is any significance to this. It's my feeling as long as all of our information is from the newspapers—Please forgive (p. 697) me. I don't want to rely upon newspapers. I just want to know what the facts are.

Mr. Johnson: I agree with the Court.

Mr. Spraul: Your Honor, one point on the record for Mr. Johnson's benefit.

The Court: Right.

Mr. Spraul: There have been affidavits filed.

The Court: O. K.

Mr. Spraul: So I believe it's more than just a newspaper record.

The Court: All right. I might also indicate parenthetically on the second day of this case I went down and checked the wiring in my house (laughter) and found it to be copper.

O. K., gentlemen, if there is nothing further, I would like to get started.

Mr. Chesley: Your Honor, I have one other thing further—

The Court: Yes.

Mr. Chesley: —and I just want to put it on the record.

The Court: All right.

Mr. Chesley: I am a little concerned in view of the Sixth Circuit decision in Standard Reliance as to the ex-

clusion of even the defense counsel unless they waive their (p. 698) rights on a question of could it be construed as any kind of ex parte. Since these are defendants, our position on behalf of the plaintiffs is that our preference would be that the defense counsel that want to be here be present. That's just for the record.

The Court: Mr. Chesley, this is hardly similar to Standard Reliance. That was something that occured while a case was in progress and I had an opportunity to interrogate the jurors then. This is a discharged jury and, as I say again, I am not even sure I have authority to bring them in. I have some real doubts about that; and I don't believe that anybody has a right, a legal right, to be present. I think if I wanted to I could call them in, interrogate them myself, put it on the record and there it is for the appellate court. I am not going to allow counsel to participate in questioning, and you have raised your point and you are here as observers.

Mr. Chesley: Your Honor, one last thing for the record so that there will be no debate on this question—

The Court: Right.

Mr. Chesley: —of the Reconstruction of a Tragedy. We would like to cite into the record pages 7,120 through pages 7,124 in which the only thing we discussed with your Honor was the Reconstruction of a Tragedy as opposed to the number. It is true that the Court at page 7,124 (p. 699) discussed the number, 13,013.

The Court: Mr. Chesley, it's obvious my position on that, and we have had portions of the record examined and it is quite clear that the document that was seen by the jury was called to everyone's attention by number. It

seems to me on Friday, at the very latest on Monday morning, Mrs. Anderson gave both sides a list of all exhibits and that number was included and no one objected to it.

Mr. Chesley: Your Honor, for the record, could we have the number of the other Reconstruction of a Tragedy?

The Court: I don't have it handy. Mr. Pecht, are you in the courtroom?

Mr. Pecht: Yes.

The Court: Do you know? It's a 400,000 number.

Mr. Pecht: Do you have that memo?

The Court: Let me think a second.

Mr. Chesley: I would just like to have it for the record.

The Court: You may.

Mr. Cassis: I think it was 400,001.

Mr. Chesley: It's a 400,000 number.

The Court: It is a 400,000 number.

Mr. McCracken: Mr. Pecht, wasn't there also a copy attached to Best's deposition?

Mr. Chesley: It was the Best Deposition Exhibit (p. 700) Number 3, which was then converted into a court number, probably a 400,000 number.

The Court: Gentlemen, I have done what I frequently do; I put it in a safe place and now I can't remember what the safe place is.

Mrs. Anderson says 400,001, and I will take her word for it.

Mr. Chesley: O. K., your Honor. Are we able to determine at this time, for the record only, as to whether or not there was any other number for Reconstruction of a Tragedy other than 13,013 and 400,001 that would have been on Mrs. Anderson's list?

The Court: I don't know at the moment. I can't respond to that.

Mr. McCracken: Is this the list you are looking for (indicating)?

The Court: No, not really. I am looking for the portions of the record that I had Xeroxed that bear upon this, although may I see it for just a moment?

Mr. McCracken: That's the telephone conversation (handing).

The Court: Yeah. In my disposition of this I will attach the documents or the list of documents that was submitted to all counsel prior to the meeting on Monday, on that Monday.

(p. 701) All right, gentlemen, I would like to get started.

Mr. Brown: Your Honor, I have two questions—

The Court: All right.

Mr. Brown: —if I may.

The Court: Sure.

Mr. Brown: This is new to me and I am sure all of us. Do you intend to give an oath to these people?

The Court: No.

Mr. Brown: All right. Second question, are you going to ask them, assuming arguendo that a discussion did take place about the checking of the aluminum wire, do you intend to ask the jurors whether it had any effect upon their verdict?

The Court: Oh, my goodness, no.

Mr. Brown: I am not saying what effect.

The Court: Mr. Brown, I think that that is improper for me to do. No, I am not interested in what affected their deliberations. I don't think I can ask that.

Mr. Brown: I am not sure. That's why I wanted to know what you were going to do.

Mr. Chesley: Your Honor, we would request on behalf of the plaintiffs that the witnesses—pardon me—that the jurors be sworn.

The Court: Well, I hadn't given that too much (p. 702) thought.

Mr. McCracken: Aren't they still under the juror's oath?

The Court: They are discharged.

Mr. Chesley: Discharged. That's why we would think that they should be sworn.

The Court: I don't see any particular problem with it.

Mr. Brown: If you do, do it as a group.

The Court: I don't want to bring them down as a group, Mr. Brown. I would like to do it separately.

Mr. Brown: Oh, I see.

The Court: I will swear them in.

Mr. Chesley: Thank you, your Honor.

The Court: I have no problem.

Mr. Gilligan: Your Honor, with regard to the questions, when we filed our motions with regard to the interrogation of the jury, on page 9 of our memorandum we had listed out some questions. I don't believe the defendants have filed anything objecting to that, and I don't know if your Honor has had an opportunity to look at them.

The Court: I have.

Mr. Gilligan: We did not ask any questions which would go to the mental impressions of the jurors, and so in accordance with 606(B) of the Federal Rules of (p. 703) Evidence, may I ask your Honor if it's possible if we might be able to by agreement—

The Court: No.

Mr. Gilligan: —suggest that those questions be asked?

The Court: No. I am not going to be bound by what either side agrees for me to ask. This is for my information. I have got a motion before me and I am going to dispose of it; and just as I would do my independent research on the law, I am doing independent research in the facts, and you are here as observers.

I point out again that it would seem to me perfectly appropriate if I did this without anybody present. This is not a procedure that is set forth anywhere in any statute or any rule that I have ever seen. I just want some facts.

Mr. Chesley: Your Honor, we would ask that juror Vories be asked whether he did this inspection by himself and, if not, who he did it with.

The Court: Well, Mr. Chesley, I am simply going to take this one step at a time. You have filed the questions that you wish me to ask. The record will show what I do. If I am in error I have the utmost confidence that somebody will take it to the Court of Appeals.

Mr. McCracken: I would also like for the record (p. 704) to reflect that the fact that the defendants did not respond to their questions doesn't mean that we assent to their questions.

The Court: I don't believe it's required.

Mr. Stein: Judge, while we are all here together on a related but not exactly this subject—

The Court: Yes.

Mr. Stein: —would you tell us—We have not filed anything in response to their pleadings—

The Court: All right.

Mr. Stein: —not pleadings; their memorandum and motions—

The Court: Right.

Mr. Stein: —and so forth and, as I discussed with Mr. Pecht, while—He just didn't know what you had in mind of terms of a briefing schedule; and it didn't seem to make any sense to respond to part of it when perhaps the major part involved this investigation.

The Court: Well, Mr. Stein, first of all, you are aware I extended time for them to file their memorandum.

Mr. Stein: So they haven't even filed that.

Mr. Chesley: That's correct.

The Court: Yes. It seems to me that your time to respond doesn't begin until they have filed their memorandum. I would ask that you do it with deliberate speed. (p. 705) I don't think it serves anybody's purpose for this thing to remain in limbo. After you have filed your memorandum I may give them a very few days to respond and then I want to rule promptly; and frankly, gentlemen, I would like to rule on this by the end of the month if that is possible. Now, this is the 7th. When is your memorandum due?

Mr. Chesley: The 12th, your Honor.

The Court: All right. Ten days beyond that would be the 22d.

Mr. Stein: 22d.

The Court: Does that seem like enough time?

Mr. Brown: Probably reasonable. I think we have done our research.

Mr. McCracken: We have done our research.

The Court: All right. O. K., and I would simply like, whichever way I rule, I would like to do it by the end of the month and, you know, get this phase of the case behind me.

Anything further, gentlemen? By the way, it's a pleasure to see all of you (laughter), and let's proceed with the jury.

Mr. Stein: Are those who are not going to stay going to be meeting any special place? Where are we going to get together?

Mr. McCracken: I think we will go back over to (p. 706) 1036.

A Voice: To El Greco's.

Mr. Johnson: An anticipatory victory party (laughter).

Mr. Cassis: We will be at Covington Chili.

The Court: Let me give you the procedure. They will come down here one by one. When they are finished they will then go across to the witness room next to the courtroom. They will not have an opportunity to talk to each other until after each has been down.

Mr. McCracken: Thank you.

The Court: Thank you, gentlemen. Those of you who will be staying, may I ask you to put your chairs back against the wall?

Mr. Gilligan: Your Honor, the procedure, so we are not interrupting you at all, in the event after your Honor finishes asking them questions—

The Court: Yes.

Mr. Gilligan: —will there be any opportunity for us to perhaps suggest additional questions to your Honor? I don't want to speak up—

The Court: Yes. I don't want you to speak up. I would like you to come over here and in effect have a bench conference.

Mr. Gilligan: Afterwards.

(p. 707) The Court: Yes. Let's see, we will want a fourth chair back there.

And, gentlemen, could I impose on you that while they are here you not smoke? O. K. In years to come you will thank me.

Gerry, I think I will ask you to assist. Let's bring them down. You might ask them who was juror number 1 and let's have that juror first.

Mr. Pecht: O. K.

The Court: And then when they are finished you will take them over to the witness room. By the way, is the press out there?

Mr. Pecht: (Nodding.)

The Court: Predictable.

Mr. Brown: They were.

The Court: Well, predictable.

Mr. Pecht: Judge, this is Mrs. Pagan.

The Court: Good morning. How are you?

Mrs. Pagan: Fine. Thank you. How are you?

The Court: We are going to end up the way we started—

Mrs. Pagan: We sure are.

The Court: —asking you questions. I just want to ask you a few questions and, since it's going to be on the record, I want it to be under oath.

(p. 708) Mrs. Pagan: Okay.

The Court: Mr. Crawford, would you administer the oath?

EDITH MARY PAGAN, being first duly sworn, testified as follows:

Examination

By the Court:

Q. And let's have your name for the record.

A. Edith Mary Pagan.

Q. O.K. Mrs. Pagan, I read in the newspapers that one of the jurors checked the switches, the receptacles in his home and that he told other jurors the results. Do you have a recollection of anyone telling you that fact?

A. Nobody told me about it.

Q. O.K. Was this subject ever brought up in your presence?

A. Not that—I never heard anybody talk about it.

Q. O.K. You did not?

A. No, sir.

Q. Neither during the time the evidence was coming in the case nor during the time of the deliberations?

A. No, sir.

Q. Let me ask you one other question. This is a book called Reconstruction of a Tragedy. Do you recall seeing (page 709) that in the jury room?

A. Yes, I do.

Q. O.K. And did you read it?

A. No, I did not.

Q. O. K. Do you recall anybody making any comments about what was inside of it?

A. No, I do not recall any comments. I did see people looking through it.

Q. O. K. Do I understand that it was not the subject of deliberation?

A. It was not the subject of deliberation; no, sir.

Q. O. K. Thank you very much, Mrs. Pagan.

A. Uh-huh.

Q. It's nice seeing you again.

A. You too.

Q. One last thing. You are not obligated to talk to any newspaperman. If you want to you may, but you are not obligated to and if they are harassing you you are not required to answer their questions.

A. Thank you.

Q. O. K. Thank you, Mrs. Pagan.

(Juror excused.)

Mr. Chesley: Before the next juror comes in, may we pose an objection? There was a question to (p. 710) this juror whether or not anything having to do with their deliberations resulted from the Reconstruction of a Tragedy.

The Court: That was not the question. I just asked was this a subject of deliberations.

Mr. Chesley: I am sorry, Your Honor that's correct. That was what your question was. We would just for the

record object to that question because it goes to mental impressions—

The Court: All right.

Mr. Chesley: —606(A).

The Court: I don't think so. I think the improper question would be, "Did this affect the deliberations?" but I have no problem with it.

Mr. Pecht: Judge, this is Mr. White.

The Court: Good morning, Mr. White.

Mr. White: Hi. How are you?

The Court: Do sit down.

Mr. White: Thank you.

The Court: Mr. White, from what I have read in the newspaper there are a couple of questions I want to ask you.

Mr. White: Sure.

The Court: And since we are doing it on the record, I would like to do it under oath. Mr. (p. 711) Crawford, would you please administer the oath to this witness?

JOSEPH J. WHITE, JR., being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mr. White, I have read in the newspapers that one of the jurors had made some tests upon his own wire

receptacles in his home. Were you aware that that had occurred?

A. No, sir; not at all.

Q. Did anyone ever discuss that with you?

A. No, sir; not with me.

Q. O. K.

A. In fact, I told the newscasters that contacted me, I said, "This is absolutely news to me." And I said, "I think you are going to be blowing something out of proportion even if it was said."

I told him possibly that it could have happened, but it would have had to have happened out of my presence and that would have been kind of unlikely.

Q. O. K. To the best of your recollection, nobody discussed this with you?

A. No, sir.

Q. All right. Mr. White, this is a pamphlet (p. 712) entitled Reconstruction of a Tragedy.

A. Yes, sir.

Q. Do you recall seeing it in the jury room?

A. Not for me to know it, no, I did not. But I do remember Mr. Ziegler and another lady looking at a book, but I did not know what the book was. I never looked at any of the books, so at the time I absolutely did not know what it was. Since then I found out that they was looking at that, but I didn't know that.

Q. At the time of deliberations?

A. No, sir. In fact, this did not enter into our deliberations. The aluminum thing that the fellow was supposed to have checked, there was never a mention of this in our deliberations. The jury was absolutely—had based their opinion on what was said in the courtroom, and that was all as far as my—

The Court: All right. Mr. White, thank you very much.

A. Is this still being recorded?

Q. Yes.

A. All I was going to tell you was that I appreciated what you did do for us.

Q. Mr. White, it was a pleasure, really. You were good partners. I enjoyed it.

A. Well, I will tell you, I really, truly think (p. 713) that you had a fine group of jurors and I think you got a fair decision to this.

Q. No one can ask for more. It's nice to see you again, Mr. White.

A. It's nice to see you.

Q. Thank you.

(Juror excused.)

Mr. Brown: Your Honor, you did not tell him he didn't have to talk to the press.

The Court: You are right, and I should have.

Mr. Brown: I almost said something, but I thought I better shut up.

The Court: By the way, was he the foreman?

Mr. Chesley: Number 12. Akins.

The Court: My impression of this guy was that he was a good juror.

Mr. Brown: Isn't he the guy that had a part-time business or a business on his own?

The Court: Yes, and one day he asked that we adjourn a half hour early because he had an important appointment.

Mr. Pecht: Judge, this is Mrs. Gulley.

The Court: Good morning. Do sit down. Nice to see you again, Mrs. Gulley.

Mrs. Gulley: Thank you.

(p. 714) Mr. Stein: Could we have the witness' name?

The Court: Gulley, G-u-l-l-e-y, Jean Frances Gulley.

Mrs. Gulley, I read some things in the newspaper and I thought I better check it out, and I want to ask you just a few questions.

Mrs. Gulley: O. K.

The Court: And I would like, since this is on the record, that it be under oath, and I am going to ask Mr. Crawford to administer an oath to you, please.

JEAN FRANCES GULLEY, being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mrs. Gulley, I have heard it said that one of the jurors went to his home and checked the wire connections in the receptacles. Were you aware of that?

A. No, I was not.

Q. Did anyone talk to you, any other juror, about that test that he made?

A. No.

Q. Was it ever discussed in your presence?

A. No.

Q. O. K. This is a pamphlet entitled (p. 715) Reconstruction of a Tragedy. Do you remember seeing this in the jury room?

A. Yes, I do.

Q. Did you look at it?

A. It was lying across the table from where I was sitting. Someone else had been reading it. I got up and walked around the table and leafed through it and read a paragraph here and there. I do not even remember what I read.

Q. O. K. Was it discussed with other jurors?

A. Not to my knowledge.

Q. O. K. All right. That's all I wanted to know, Mrs. Gulley. Let me point out to you, you are not required to talk to the press if you don't want to.

A. All right.

Q. They have no right to force you to talk to them. If you want to, you may, but if you don't want to be both-

ered with them, you don't have to talk to them.

A. O.K.

Q. And you are specifically not required to talk to any lawyer or anyone representing a lawyer.

I thank you for coming down. It's nice seeing you again.

A. You are welcome.

(Juror excused.)

(p. 716) Mr. Gilligan: Your Honor, can I ask a question?

The Court: Yes.

Mr. Gilligan: In the event that one or more of the jurors would indicate that they did have some discussions during the course of the trial, could I ask that the Court inquire as to what those discussions were, that maybe there were some discussions in addition to the testing, perhaps about the evidence during the course of the trial?

The Court: I have some real hesitation, Mr. Gilligan, in going into that. I don't want to know what conclusions they came to. I think that's improper.

Mr. Gilligan: I didn't mean conclusions, but I meant perhaps discussions.

The Court: How are you, sir?

Mr. Burton: All right.

The Court: Do sit down.

Mr. Pecht: Mr. Vories.

Mr. Burton: Burton.

Mr. Pecht: Burton. I am sorry.

The Court: You are Mr. Burton, right. Mr. Burton, from what I read in the newspaper I thought I ought to talk to each of the jurors, and (p. 717) I have just a few questions to ask you. Since it's on the record, I would like to do it under oath.

Mr. Burton: All right, sir.

The Court: Mr. Crawford, would you administer the oath to this witness, please?

WILLIAM L. BURTON, SR., being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mr. Burton, I read in the paper that one of the jurors had made some tests of his electrical connections in his home. Did anyone ever discuss that with you?

A. He mentioned it up there, but he didn't discuss it. What he did, he just said, hearing all this stuff about the possibilities of electrical wiring loose and all, he took the plates off and he checked the screws to be sure they were tight.

Q. When did this happen, before you were deliberating or during deliberations?

A. It was sometime during the trial. No, it wasn't while we was deliberating.

Q. O. K. This was sometime—

A. I don't recall just when. It was sometime during the trial. I think it was shortly, sometime around (p. 718)

when they were talking about how dangerous the screws were, coming loose and all this and so forth.

Q. That would have been fairly early in the trial, wouldn't it?

A. Probably would have. I just can't recall when it was.

Q. Were there a group of you that he talked to or was it just you? Do you recall?

A. I don't recall.

Q. O. K. And if I understand what you are saying, you specifically do not recall this happening during deliberations?

A. No, sir.

Q. O. K. Let me ask you something else, Mr. Burton. This is a pamphlet entitled Reconstruction of a Tragedy.

A. I saw that.

Q. You saw that?

A. I didn't read it.

Q. You did not?

A. I saw it.

Q. Was it in the jury room while you were deliberating?

A. Yes, it was in the jury room.

Q. O. K. Was it the subject of any discussion (p. 719) among jurors that you recall?

A. No, it wasn't.

Q. Mr. Burton, thank you.

Mr. Chesley: Your Honor, may we approach the bench?

The Court: All right. Let me come over there. I will talk to you.

(Bench conference off the record.)

Q. Mr Burton, when the other juror mentioned that he had made these tests, did he tell you what he found?

A. He just said he didn't find no loose screws, is all.

Q. O. K. All right.

Mr. Chesley: One last thing, your Honor, It's my—

The Court: That's all the further I am going, Mr. Chesley.

Mr. Chesley: I wanted to—

The Court: That's all the further I am going.

Q. Mr. Burton, you are not under any duty to talk to the press.

A. All right.

Q. If you want to, you may, but they have no right to interrogate you if you do not want to be bothered.

A. No, and I won't talk to them either because (p. 720) they blow everything out of proportion.

Q. Well, they are trying to sell newspapers. Mr. Burton, thank you very much, and it's real nice seeing you.

A. All right. Thank you.

Mr. Pecht: Here you go, Mr. Burton.

(Juror excused.)

Mr. Chesley: Your Honor, our concern was that this man did not identify who the juror was that told him.

The Court: I don't think it matters, really.

Mr. Chesley: Your Honor, may we also request, because I don't know if we are getting close to it, when Juror Vories comes in, so that we don't have to ask any questions, whether or not he would identify whether he wrote this letter to the news media—

The Court: No. No.

Mr. Chesley: —and I have one in his handwriting.

The Court: No. If it is in fact Juror Vories who did the examination, I want to examine him a bit more closely, but I am not going to get into what he did in writing letters.

Mr. Pecht: This is Mrs. Spicer.

(p. 721) The Court: Good morning, Mrs. Spicer. Nice to see you. Would you be more comfortable there?

Mrs. Spicer: Oh, O. K.

The Court: I just have a few questions from what I read in the newspaper and, since we are on the record, I do want it under oath.

Mr. Crawford, would you administer the oath to this witness, please?

DOROTHY AIERER SPICER, being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mrs. Spicer, I read in the paper that one of the jurors had made some tests on the electrical connections in his house. Did anyone ever discuss that with you?

A. No.

Q. This was never a subject of deliberations of the jurors?

A. No, sir.

Q. O. K. This is a pamphlet entitled Reconstruction of a Tragedy. Do you recall seeing that in the jury room?

A. Yes, I do.

Q. O. K. Did you by chance look at it?

A. I leafed through it. I really didn't read it, but I did look through it.

(p. 722) Q. O. K. Was this a subject of discussion among jurors?

A. No, not really. I don't think it was. I mean I didn't talk to anybody about it.

Q. O. K.

A. But I remember the book and I saw it, and I looked through it. But I really didn't read anything in it, and my mind was already made up before I saw that book.

Q. O. K. Mrs. Spicer, thank you, and it's nice seeing you again.

A. You are welcome.

Q. Oh. Do let me point out to you, you are not required to talk to the newspaper. If you wish, you may.

A. No, I don't.

Q. O. K. You are under no obligation to answer any of their questions or to discuss anything with them.

A. O. K.

Q. It's nice seeing you again.

A. Thank you.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mr. Vories.

The Court: Hello, Mr. Vories, nice to see you again. Do sit down. You will be more comfortable there, I think.

Mr. Vories, I just wanted to ask you a couple (p. 723) of questions and just get some background. Since I am on the record, I do want to ask you some questions under oath.

Mr. Crawford, would you administer the oath to the witness, please?

JOHN ROLAND VORIES, being first duly sworn, testified as follows:

Examination

By the Court:

Q. O. K., Mr. Vories, it's my understanding that at some time during the trial you checked your electrical system in your home?

A. Yes, I did.

Q. Approximately when did that occur?

A. Sir, the first part of the trial. It come out and they was talking about aluminum wire wired to outlets was like a time bomb; it could go off any time, and they brought out slides and they was showing the outlet glowing and charring and they showed the studs burning; and that's why I went home and checked them that night. I didn't check the aluminum for tests or experiments or to see if it was safe. I was concerned with my family.

Q. O. K. When was your house built? Do you know?

A. In 1969.

Q. Was it built for you or—

(p. 724) A. No. They had like seven different models up there, and you could choose from any model, and I got whatever plot of land—

Q. O. K. What I mean is, you have been the only occupant of that house?

A. Yes, sir.

Q. O. K. And when you bought it, had it been under construction or was it still to be constructed or was it finished?

A. It was, I told them what kind of brick and all that stuff, and they built it. When it was finished they told me it was finished, and that's when I moved.

Q. Mr. Vories, what is your occupation?

A. Refrigeration mechanic for Coca-Cola.

Q. O. K. As such you do work on electrical systems?

A. Not wiring. Like tracing schematics and broken wire in a vendor or ice maker, something like that, but nothing to do with house wiring.

Q. Do you go out on the job and repair refrigeration equipment for them?

A. Yes, in the field, yes.

Q. And this deals with things like compressors?

A. Right.

Q. And other refrigeration equipment?

(p. 725) A. Right.

Q. O. K. What did you find when you checked the connections in your home?

A. I didn't find anything. I took my outlets out and I got me a flashlight and I turned my electric off, and I was looking for a receptacle that was charcoaling, like they said.

Q. Yes.

A. And then after I didn't see anything like that, I pulled the thing out and tried to tighten the screws, see if they was tight.

Q. O. K. And what did you find?

A. I found they was tight.

Q. O. K. Do I assume that you—I don't know what the technical term is. I know that the screw at the top

and at the bottom holds the connections inside of the receptacle.

A. Right.

Q. You took those off and pulled this out; is that right?

A. I pulled it out a quarter of an inch so I could get a screwdriver on the screw.

Q. Right. And then you checked the binding head screw?

A. Right.

(p. 726) Q. O. K. Incidentally, please don't be nervous.

A. I am nervous.

Q. Well, you shouldn't be. I am not trying to assess blame or anything. I am not sure you have been—

A. Well, what I did, I didn't think I was doing anything—

Q. Mr. Vories, I don't think that you did anything wrong and I don't want you to be nervous. I am just trying to get some factual background, O. K.

And that was early in the trial? My recollection is that the slides were part of Mr. Aronstein's--

A. Right.

Q. —testimony?

A. Yes, uh-huh.

Q. O. K. And when you then found these things,

whatever you found, did you then mention this to any of the jurors?

A. Well, I can remember when we went upstairs with a break or something—I don't know why I come up—I said, "Well, I had aluminum in my house and I had checked a couple of outlets and I found my terminals to be tight," and that's the last time—first time and last time it was ever said.

Q. O. K. Do you remember to how many jurors you mentioned this?

(p. 727) A. It's like—I really don't know. If somebody was within earshot of what I said, I guess they heard it. Except for what I said, but I didn't elaborate. I didn't tell them I was checking the outlets for the safety of my family, which I did do.

Q. Right.

A. I didn't think it had no bearing on the case whatsoever.

Q. O. K. Mr. Vories, let me tell you something. The second day of this trial I went downstairs and checked my wiring too. I didn't check with a binding head screw, but I found out that my wiring was copper.

You said that you mentioned this once. This was early in the trial?

A. Early in the trial.

Q. O. K. And it was not mentioned thereafter; is that right?

A. It was never mentioned again.

Q. And it was not a subject of any discussion that you can recall?

A. Nothing at all.

Q. All right. Mr. Vories, this is a pamphlet entitled Reconstruction of a Tragedy.

A. Uh-huh.

Q. Do you remember seeing this in the jury room?

(p. 728) A. I remember seeing it but I never got to look at it. The only thing maybe I was looking at, they was saying how pretty the fountain was. That's the only thing I seen I looked over his shoulder and saw the fountain. I never did get to read nothing in the book.

Q. O. K. And once again, Mr. Vories, please don't be upset or nervous. It just doesn't warrant that.

Let me tell you, you are not required to talk to the press. If you want to, you may, but you don't have to.

A. I won't.

Q. They have no right to interrogate you and, above all, no lawyer may question you without my permission and I am not about to give that permission.

It's nice to see you again.

A. Yeah.

Q. I think that the jury was a good jury and, frankly, I enjoyed that case and I enjoyed by contact with you. O. K., thank you very much.

A. Uh-huh.

(Juror excused.)

Mr. Chesley: Your Honor, for the record—

The Court: Yes.

Mr. Chesley: —we would have wanted to have asked how many receptacles he took out and, also for the record, we wanted to find out relative to (p. 729) the information that was contained in the letter which had been represented to us as having been written by him.

The Court: Well, in neither event do I consider it significant for my purposes and, gentlemen, I am just not going to have somebody feel that he has incurred the wrath of the United States District Court. The man was obviously nervous.

Mr. Chesley: Scared.

The Court: And I don't want him to be.

Mr. Pecht: Judge, this is Mrs. Kremer.

The Court: Mrs. Kremer, how are you? Do sit down.

Mrs. Kremer: O. K.

The Court: It's nice to see you again.

Miss Kremer, I read the newspapers too and there were some questions that I thought I just ought to ask some of the jurors and, since it is part of the record, I would like to do it under oath.

Mrs. Kremer: O. K.

The Court: Mr. Crawford, would you administer the oath to Mrs. Kremer, please?

MARY A. HEIL KREMER, being first duly sworn, testified as follows:

(p. 730) *Examination*

By The Court:

Q. Miss Kremer, I am told that one of the jurors did some checking of his own wiring system. Before you read that in the paper, were you aware of that fact?

A. Yes, sir; I was.

Q. Can you tell me the circumstances that caused you to be aware of that?

A. Yes. John told me.

Q. John is Mr. Vories?

A. John Vories.

Q. Right.

A. Told me that he had had aluminum wiring in his house and that he just took out a couple of receptacles just to check them.

Q. I see. When did he tell you that? Do you recall?

A. Yes. It was during deliberations.

Q. During deliberations, O. K. And did he tell you what the results of his test were?

A. He just said that he found that all his screws were tight.

Q. O. K. Is that the only time you can recall talking to anyone about this?

A. Yes, it is.

(p. 731) Q. O. K. Was this said to you personally or was it said with a group of people there? Do you recall?

A. It was just, John and I were looking over the artifacts that were sitting on the table, and it was just him and I. To my knowledge, I think I was the only person that heard it. I am not sure though.

Q. Do you recall ever hearing this before deliberations started from him?

A. No.

Q. O. K. This is a pamphlet I am holding up called Reconstruction of a Tragedy?

A. Uh-huh.

Q. Do you remember seeing this in the jury room?

A. Yes, sir.

Q. Did you by chance look at it?

A. Yes, I did.

Q. And was this a subject of discussion during deliberations?

A. No, not— No, the main topic was just the pictures and the receptacles that Dr. Aronstein had tested.

Q. That was the discussion in the jury?

A. Yes.

Q. Not in regard to this pamphlet; is that right?

A. Yes.

Q. That was separate from this pamphlet?

(p. 732) A. Yes. I read that on my own, parts of it. I flipped through it.

Q. O. K. But do I understand what you are saying that this, however, was not a subject of discussion among the jurors?

A. No.

Q. O. K. Miss Kremer, thank you. Nice seeing you again.

A. Yes.

Q. Oh. You are not under any obligation to talk to the press.

A. O. K.

Q. If you want to, you may, but they have no right to ask you questions and require you to answer them.

A. O. K.

Q. Thank you. Take care.

(Juror excused.)

Mr. Pecht: Judge, this is Mrs. Knapp.

The Court: Mrs. Knapp, how are you today?

Mrs. Knapp: Fine.

The Court: It's nice to see you again.

Mrs. Knapp, I read the newspapers, like everybody else, and I decided I really ought to talk to the jurors and ask you some questions and, since I am doing it as part of the record, I would like to (p. 733) have the answers under oath.

Mr. Crawford, would you administer the oath to this witness, please?

ALVINA HUBER KNAPP, being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mrs. Knapp, I read that one of the jurors had made some tests on the aluminum connections in his house. Before you saw it in the paper were you aware of that?

A. I heard him say he had tested to see if the screws were tight on some of his devices.

Q. O. K. And was this Mr. Vories?

A. Yes.

Q. When do you recall him saying that?

A. Well, it was—To be truthful, I don't know. I would say somewhere maybe beginning or middle of the trial.

Q. O. K. I asked the wrong question.

A. Oh, I am sorry.

Q. That's all right. You really answered it. My question was: Was it during deliberations or before deliberations?

A. Oh, it was before.

Q. It was early in the trial that you recall?

(p. 734) A. Earlier, yes; not deliberations.

Q. And was it just the once that you remember him saying that?

A. I don't remember more than once.

Q. O. K. Do you recall whether that subject was raised during deliberations?

A. I did not hear it if it was.

Q. O. K. Let me ask you something else. This is a pamphlet called Reconstruction of a Tragedy.

A. (Nodding.)

Q. Do you remember seeing that in the jury room?

A. Yes, I do.

Q. Did you look at it?

A. I looked at the pictures.

Q. O. K. Do you recall whether or not this pamphlet was the subject of discussion during deliberations?

A. I didn't hear it discussed.

Q. O. K. Thank you. That's all I wanted to know.

A. O. K.

Q. Oh, Miss Knapp. You are not required to talk to the press.

A. Oh.

Q. If you want to, you may.

A. I don't want to.

(p. 735) Q. O. K. Well, they can't make you.

A. O. K.

Q. And you don't have to answer any of their questions.

A. I don't.

Q. O. K. It's nice seeing you again.

A. O. K.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mr. Ziegler.

The Court: Good morning, Mr. Ziegler. Nice to see you again.

Mr. Ziegler: Same here.

The Court: Do sit down.

Mr. Ziegler: Sure.

The Court: Like everybody else, I read the newspapers—

Mr. Ziegler: Unfortunately, yes.

The Court: —and I thought that I ought to talk to the jurors and, since it's on the record, why, I would like to do it under oath.

Let me ask Mr. Crawford to administer the oath to you, please.

Mr. Ziegler: Sure.

The Court: Mr. Crawford.

(p. 736) KENNETH LEO ZIEGLER, being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mr. Ziegler, I read in the paper that one of the jurors had checked his aluminum connections, the connec-

tions in his house. Before you read it in the paper were you aware of that fact?

A. Yes.

Q. O. K. Do you recall approximately when you heard that?

A. As I explained to the guy Saturday—Friday—Well, let me get something straight. I did not confirm this; what I confirmed to was that he had aluminum wire in his house.

Q. Right.

The Kentucky Post, believe me is the last time I ever talk to them. Everything he completely said was inadequate to what I was agreeing to.

Q. All right. Please don't feel that you did anything wrong, Mr. Ziegler.

A. Believe me, I was very offended when I read the paper.

Q. This happens with some frequency. Newspapers do not necessarily listen as closely as they ought to.

(p. 737) A. They sure don't. I thought the reason he came to my verdict—

Q. Well, nobody has a right to ask you, absolutely no one can ask you why you reached your verdict.

A. That's what I thought he was after.

Q. Was it before deliberations or during deliberations?

A. Way before deliberations, O. K.; and as I did explain Saturday to the Enquirer, that it wasn't tossed

out to me. It was 18 of us. Maybe they all weren't there at the time, but it was before we started the trial, I recall him saying.

Q. Excuse me. Before you started deliberations?

A. No; way before we started on like 8:30 trial.

Q. O. K.

A. When we all was there.

Q. Right.

A. I remember him tossing it out, not to me, just in a conversation that "I checked my aluminum wiring last night," something like that. He didn't go into detail. I didn't know if he checked one, if he checked two, if he pulled the plugs or what he did, if he tightened the screws, what he did. It wasn't directed to me. It was just a conversation I heard him throw out. When you are there 37 days with 18 people, 18 walks of life, you talk about things, and (p. 738) I didn't think anything of it at that time, and I still don't.

Q. O. K. I assure you, Mr. Ziegler, that I am not trying to find fault, and I just want to get some background.

A. Yes.

Q. Did he say what the results of his test were?

A. No, he did not. Like I said, it was indirect, indirect question or answer, whatever you want to put it, and I didn't even think of it any more. As a matter of fact, I forgot it until they asked me that, and I said I frankly didn't recall throwing it out.

Q. When you say he asked, you mean a reporter?

A. Yes, from the Enquirer.

Q. O. K.

A. He also told me that the letter was signed by John Vories who, because I didn't get a chance to read the letter until after I got a chance to read it, until it was in the paper that Saturday. I didn't think anything directly about that letter because the Kentucky Post didn't mention anything to me Friday about it.

Q. I see. This was a letter that was published in one of the newspapers—

A. Yes.

Q. —presumably by a—

(p. 739) A. Judge, according to him, it was from John Vories, he told me.

Q. All right. And your recollection is that the only time this was mentioned was early in the trial?

A. Way early. It may have been day three. I mean—I don't even—It was way back.

Q. O. K. All right, and it was not brought up during deliberations to your recollection?

A. I did not hear a word of it.

Q. O. K. Let me ask you another question. I have got a pamphlet here called Reconstruction of a Tragedy.

A. Yes.

Q. Do you remember seeing that in the jury room?

A. I sure do, right up on the main table.

Q Did you look at it?

A. I sure did.

Q. O. K. And was it a subject of discussion by the jurors?

A. The only two that I can remember looking at it was Miss Mary Kremer—

Q. Yes.

A. —and I was the first one to have it. For some reason I sat down, it was staring right at me there, and what I was looking at mainly was to try to find when the fire was first indicated; and I read the articles on Mrs. (p. 740) Druckman, when she noticed the fire, went out in the bar-room. Then she went in the Zebra Room and said, "Hot, hot," and then the hot smoke, and then that section on.

I did see other things in the beginning, but I was looking for mainly the beginning of the fire and what took place from then on, what I was looking for, because I do remember some of that was brought up and I was really interested in that particular area, what went on on the first initial point of the fire notice at 8:45 and then when the fire department was called at 9:01, stuff like that.

I did see other stuff in the beginning of it, but it didn't mean anything to me.

Q. Mr. Ziegler, was this the subject of discussion among the jurors, this pamphlet?

A. Me and Mary—That's the only other person that I remember that we really got involved in it, was us two.

Someone may have overheard us talking about it but, as far as saying, "Hey, on page 6 we got this," you know, "what do you think about it?" no. I do remember reading the part about her discovering the fire. I think I read that out loud, but everybody was really involved in other issues of their own mind, I guess, what they were really interested in in the morning session, and really it was just the first two hours or hour and a half that I really was looking at that.

(p. 741) And then I remembered looking over a lot of artifacts on the table and I remember going downstairs before we went to lunch. As a matter of fact, I think I was downstairs when we went to lunch and I came up and got my coat and we went downstairs and waited for the marshal.

It was in the first hour and a half that I was looking at that because it was the first thing in front of me when I set myself down there, and I could remember a lot of articles and information brought out on that book, and I thought it was a very interesting book at the time that I was looking at it.

Q. All right. And as I said before, you are not obligated to talk to the press. If you want to—

A. There is no way.

Q. All right, but they are not entitled to talk to you if you don't want to. Mr. Ziegler, thank you, and it's nice seeing you.

A. Yes.

Q. I don't want you to think that there is anything you did wrong.

A. Well, I didn't think I did.

Q. O.K.

A. I thought it was—

Q. Nice seeing you. Take care.

(Juror excused.)

(p. 742) Mr. Pecht: This is Mrs. Fugate.

The Court: Good morning, Mrs. Fugate. Nice to see you again.

Mrs. Fugate: Nice to see you.

The Court: I just wanted to ask you a few questions about what I read in the paper and, since I am making a record on this, I would like to do it under oath.

Mr. Crawford, would you administer the oath to this witness, please?

EDITH GODSEY FUGATE, being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mrs. Fugate, I read in the paper that one of the jurors had looked at his own wiring system. Before you read about that in the paper did you hear that?

A. No, I never did hear it.

Q. You didn't hear it?

A. No.

Q. At any time?

A. At no time.

Q. O. K. And it was not a subject of the discussion during your deliberations?

A. No, unh-unh. I was sitting down about three (p. 743) from the—no, two from the end of the table; and the man, some of them were up at the end, but I did not hear it at any time.

Q. O. K. This is a pamphlet entitled Reconstruction of a Tragedy. Do you remember seeing it in the jury room?

A. No, I don't. I didn't read a lot of the books.

Q. O. K. You don't even recall seeing it?

A. No, unh-unh, I didn't.

Q. Do you recall whether it was the subject of discussion during deliberations?

A. No, unh-unh, not that. Mostly the pictures we looked at and the parts, things they showed us.

Q. The separate photographs, not the photographs—

A. Not that, no. No, I did not see that book.

Q. Mrs. Fugate, thank you.

A. Yes, sir.

Q. Let me tell you, you are not required to talk to the press. If you want to, you may.

A. I never.

Q. Well, you are not required to and they can't ask you questions, and you are not required to answer them.

A. I got about 20 phone calls and my children, my (p. 744) son took the phone call and said, "Don't call Mom back. She is not talking to you." So that's the way it went.

Q. It's nice to see you again, Mrs. Fugate.

A. You too, and thanks for the folder and things you sent us.

Q. Thank you for your services.

A. I appreciate it.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mrs. Huesing.

The Court: Good morning, Mrs. Huesing. How are you?

Mrs. Huesing: Fine.

The Court: Do sit down. Nice to see you again.

Mrs. Huesing: Thank you.

The Court: Mrs. Huesing, I read the newspapers too and I decided I really ought to ask the jurors some questions.

Mrs. Huesing: Glad you do.

The Court: And I want to do it for the record, so I will ask you to do it under oath.

Mr. Crawford, would you administer the oath to Mrs. Huesing, please?

AUDREY M. HUESING, being first duly sworn, testified as follows:

(p. 745) *Examination*

By the Court:

Q. O.K. I read that one of the jurors had made some tests on his own wiring. Before you read that in the newspaper were you aware of that fact?

A. John mentioned it early in the trial. This is why I am glad you called us in, because I had a reporter call me and I didn't want to talk about it, and he assured me Judge Rubin said it was all right; and he was taking a survey.

And he said, he asked if I knew of any kind, you know, anything to do with aluminum wire; and I said, "Well, it seems like I heard it." I was scared to talk. And I said, "It seems like I heard something like that."

And he said, "Well, who was it?"

And I said, "Well, I really don't know. It seemed like I heard that."

He said, "Was it John Vories?"

And I thought, well, he has got the name, so I might as well admit it. I said, "Yeah, it was John."

And he said—Now, here is where I am mixed up. I don't know whether he said it was brought up in the deliberation room or if it was brought up in the jury room.

Q. Yes.

A. But in my mind, I thought he said the jury (p. 746) room.

Q. Yes.

A. And he says that was when it was brought up and it was the early part of the trial and he didn't make any

tests. He just said he tight—He checked to see if his was tight.

Q. Screws?

A. Binding head screw.

Q. I see.

A. That's all he said to me.

Q. O. K.

A. That had nothing to do with my decision.

Q. O K. I don't want to know what your reasons were, Mrs. Huesing.

Why, was it said to you personally or in a group that he had tested his binding head screws?

A. I don't know how many was listening. It seemed like it was, you know, a group. I mean I don't know who heard it.

Q. It wasn't a conversation directly with you; is that right, just the two of you?

A. I think it was more like a little joke, I mean. No, it wasn't—I didn't take it as a test at all.

Q. O. K. This was early in the trial, you recall; is that right?

(p. 747) A. Uh-huh.

Q. Was the subject brought up during deliberations?

A. No. Now, this is where I am mixed up with because the reporter—

Q. Yes.

A. —might have said deliberations room. I don't know.

Q. I don't care what the reporter asked you.

A. I know, but this worried me all week.

Q. It just shouldn't. That's all. Please don't be worried. Other than the fact that the subject was in the newspaper I didn't read what each juror said, and I really don't care.

A. Uh-huh.

Q. I am just trying to get some background.

Your recollection is that it occurred, you heard this way before deliberation; is that right?

A. I can tell you about the time when they were— It was the first part of the trial—

Q. Right.

A. —when he said it was so dangerous in the walls, you know, if the screws weren't tight.

Q. O. K.

A. And it seemed like it was about the next day (p. 748) after we first heard that. Then you say: "Don't make up your mind about it. You haven't heard the other side or anything."

Well, it was the very first part of that trial.

Q. All right. And you are sure it was not then brought up again during deliberations?

A. No. The only thing—

Q. O. K.

A. —that was brought up during that, I mean I was looking at the receptacles that they had taken out of the Beverly Hills; and I know John says, "Well, finally we get to see the real receptacles," and he was just checking them over.

Q. O. K. But he did not mention again—

A. No, nothing about this.

Q. —about what he had done in his own home?

A. Not to me.

Q. All right. Let me ask you another series of questions. This is a pamphlet entitled Reconstruction of a Tragedy. Do you remember seeing that in the jury room?

A. I think it was up there.

Q. Did you look at it?

A. No.

Q. O. K. Do you remember whether that was the subject of any discussion by the jurors?

(p. 749) A. Not that I recall.

Q. O. K.

A. I don't remember it.

Q. Good enough. That's all I wanted to know. Thank you very much. It's nice to see you again.

A. Well, I am glad you called us over. I feel bad, you know.

Q. Please don't. Please don't. There is nothing that you did that was wrong, and you are not the first person to be asked by newspapers who may or may not have gotten—

A. Well, I am not going to talk to them, but now I know.

Q. Well, I do want to tell you, you are not required to. You do not have to talk to them. If you want to, you may.

A. Well, I didn't know that.

Q. Right. But you don't have to talk to the press.

A. The way he said he was taking a survey, and it sounded like it was kind of official, and I thought I'd better answer his questions.

Q. Well, from now on you don't have to.

A. Uh-huh.

Q. It's a matter of your own choice. And thank you. It's nice seeing you again.

(p. 750) A. All right. Thank you.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mr. Akins.

The Court: Good morning, Mr. Akins. Do sit down.

Mr. Akins: Thank you.

The Court: Nice to see you.

Mr. Akins: Pleasure.

The Court: I read the newspapers too, and I decided that I really had better talk to each of the jurors about this

and, since I am doing this on the record, why, I thought it would be best if I did it under oath.

Mr. Crawford, would you administer the oath to Mr. Akins, please?

DANNY LEE AKINS, being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mr. Akins, I read in the paper that one of the jurors had done some investigating of the wiring system in his house. Before that was in the newspaper did you know that had occurred?

A. No, sir; I didn't.

Q. O.K. You don't recall any conversation that (p. 751) you were in where that was mentioned?

A. No, sir.

Q. Even before deliberations?

A. No. I was completely ignorant to the fact until a reporter called me on the phone, and I had no knowledge of this.

Q. This was not a subject of discussion during deliberation; is that right?

A. To my knowledge, no.

Q. Right.

A. I heard no discussion. As I said, you know, in deliberations, I mean we were going through the artifacts

and trying to put together the pieces of the trial and, like I said, I heard nothing of any discussion of any type of test that he had done or anybody else had done for that matter.

Q. Your first knowledge was when you read it in the paper?

A. No. No. I was at home and I was preparing to go to work and a reporter called me on the phone and asked me to elaborate on what John Vories had done—

Q. Right.

A. —as for as tests, and I told—I said, "What can I tell you? You know, I don't know what you are talking about."

(p. 752) Q. O. K. Let me show you something. This is a pamphlet entitled Reconstruction of a Tragedy. Do you remember seeing this in the jury room?

A. Yes, sir.

Q. Did you look at it?

A. Vaguely.

Q. O. K.

A. Vaguely. I didn't read through it or anything. I just happened to—It played no part in deliberation at all as far as I was concerned.

Q. I don't want to know what—

A. O. K. I am sorry.

Q. Well, it's none of my business, truly—

A. O. K.

Q. —how you reached a decision. I just want to know: Was this the subject of discussion during deliberation that you recall?

A. To my knowledge, no, and I know not on my part; I didn't discuss anything that was in that pamphlet at all.

Q. Do you recall any of the other jurors during your deliberations mentioning the Reconstruction of a Tragedy?

A. No. I recall two particular jurors, Ken Ziegler and Mary Kremer, were looking at the booklet—

Q. Right.

A. —and discussing it among themselves.

(p. 753) Q. Right.

A. But it was not an open discussion to anyone else in the room, to my knowledge.

Q. O. K. Did you overhear what they were discussing about it?

A. No. No, because at that time I was going through some photographs and I was really examining the char pattern at that particular time, I remember distinctly, of the cubbyhole.

Q. Right.

A. And I was not aware of what they were elaborating on to any degree at all. I don't know what they were talking about.

Q. This was apparently not a general discussion among all the jurors—

A. No, sir.

Q. —is that right?

A. No, sir.

Q. And do I understand you are not even sure what they were talking about?

A. No, sir. I am not—

Q. Mr. Akins, what is your occupation?

A. Well,— I am service manager for Gillespie Wrecker Company. My brother-in-law and I was in the retail management. My brother-in-law bought the company and I went (p. 754) in kind of as a silent partner with him, and I run it at night.

Q. O.K. Well, I want to thank you. By the way, I want to thank you for your services as a foreman.

A. Uh-huh. Thank you.

Q. I appreciate the fact that you undertook that. And I do want to point out that you are not required to talk to the press. If you want to you may, but they are not entitled to ask you any questions and require you to answer them.

A. Right.

Q. And no one else is entitled to interrogate you if you don't want to be interrogated. But I did want to know what happened and, frankly, I now know and I don't have to rely upon what some newspaper reporter tells me what happened—

A. Right.

Q. —since I have talked to the jurors. And it's nice to see you again.

A. Thank you.

Q. I enjoyed the experience and I hope you did.

A. It was an experience.

Q. I just found it real nice to have 12 good people around, Mr. Akins.

A. I think we were.

(p. 755) Q. I do too. I think you were a good jury. Thank you.

A. Thank you.

Q. And I appreciate your coming over.

A. Yes, sir.

Q. Take care.

(Juror excused.)

The Court: Tell the marshal—

Mr. Pecht: Take them home?

The Court: Yes.

Mr. Chesley: Your Honor, may we just state something for the record?

The Court: Do anything you want.

Mr. Chesley: At this time, your Honor, we would request additional questioning of Mr. Vories in view of some of the testimony that's come here before, in view of possible inconsistencies in Mr. Vories' testimony.

Additionally, we would ask that additional questions be asked of Mr. Vories as to exactly what he did, how many

outlets or how many receptacles he inspected, the extent of the inspection and other details.

The Court: Mr. Chesley, I am simply not going to do it. The information that I thought was important to me to enable me to consider the motion that is before me I have received.

(p. 756) Mr. Chesley: Your Honor, I just wanted that for the record.

The Court: Now, how quickly, Mr. Crawford, can we have this typed up?

The Reporter: I will see if I can find a typist who can do it in a hurry, your Honor.

The Court: It would be appreciated since the lawyers are under a time schedule, as soon as it can be conveniently done. Let's see, we don't go back into the courtroom until next Wednesday.

The Reporter: I will try, your Honor.

The Court: Now, gentlemen, in terms of disposition: My inclination at this point is to instruct Mr. Crawford to make it avaailable to attorneys only, to provide me with a copy, which I propose to seal and make available in the event there is an appeal taken by either side. Is that agreeable?

Mr. Chesley: Yes, your Honor, but we would get a copy—

The Court: Yes.

Mr. Chesley: —and would it be permissible for us to use part of the information in our memorandum and, if

that be the case, then the memorandum should be filed in camera and copies just sent to counsel.

The Court: That's right.

(p. 757) Mr. Chesley: And not filed in the clerk's office.

The Court: That is correct.

Mr. Gilligan: On the logistics, could I make a suggestion, perhaps that when they have their responsive memorandum concluded and they are going to serve it, they usually just serve it on myself as coordinating secretary, and perhaps if I would serve ours on one representative of the aluminum companies; in that way perhaps it won't be going out to that many people, if that would help.

The Court: Look, you gentlemen work that out. I have some questions about it, Mr. Gilligan. I think it will raise more complaints than it will settle.

What I think then I will do, you may be assured that I will also include in the sealed record copies of the memoranda, for whatever value that may have, but at least it will then become part of the record and the appellate court, if necessary, can review it.

Mr. Gilligan: Judge, on that issue, ordinarily there is a requirement that we serve all counsel. May I ask that we not be required to do that in this case, that is counsel—

The Court: Mr. Gilligan, I am not going to do that.

Mr. Gilligan: As to the other defendants not in (p. 758) the aluminum group is what I am referring to.

The Court: Oh, O. K. The only ones you need serve are those counsel representing defendants in this phase of the trial—

Mr. Gilligan: Right.

The Court: —and who were still in the case when it went to the jury.

Mr. Gilligan: That's right.

Mr. Brown: What again is our time schedule?

The Court: Mr. Chesley's is due by the 12th and—

Mr. Stein: And you said the 21st.

The Court: You have then 10 days thereafter.

Mr. Stein: Fine.

The Court: I am hoping that I can dispose of this by the end of March. At the moment I do not propse to hold oral argument. It is possible I may change my mind and, if so, I will notify you.

Mr. Chesley: We can request it on our memorandum?

The Court: Feel free. Gentlemen, thank you.

(Hearing concluded at 10:30 a.m.)

(p. 759)

REPORTER'S CERTIFICATE

I, Robert I. Crawford, Official Court Reporter for the United States District Court for the Southern District of Ohio, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Robert I. Crawford

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT CONVENTION

IN RE:

BEVERLY HILLS FIRE LITIGATION

THIS DOCUMENT RELATES TO:

ALL CASES

MEMORANDUM REGARDING JUROR INQUIRY

Lord Mansfield in *Vaise v. Delaval,* 1 Term Rep. 11, first laid down the general rule that a juror may not impeach his own verdict. In *McDonald & United States Fidelity & Guarantee Company v. Pless,* 238 U.S. 264 (1915), the Supreme Court of the United States stated "the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their own verdict." *Id.* at 269. However, the *McDonald* Court also said, in dicta at 238 U.S. 267-269, that there might be other instances when a jury's testimony should be heard, and therefore, it avoided formulating an inflexible rule. Several of the United States Circuit Courts of Appeal adopted and enforced varying rules consistent with the holding of the Supreme Court in *McDonald,* supra, which permitted jurors to testify in certain circumstances. Cf: *Orenberg v. Thecker,* 143 F. 2d 375 (D.C. Cir. 1944) and *Lohr v. Tittle,* 275 F. 2d 262 (10th Cir. 1960).

The Sixth Circuit also adopted its own exception to the general rule announced in *McDonald,* supra:

> "Generally, the juror's testimony will not be received, either to impeach or support a verdict, but it may be received if it relates to extraneous influences brought

> to bear upon the jurors; they may show by their testimony what the extraneous influence was, and whether it was of a nature calculated to be prejudicial." *Stiles v. Lawrie,* 211 F. 2d 188, 189 (6th Cir. 1954).

The Sixth Circuit has reaffirmed its holding in *Stiles,* supra, on many other occasions. *Womble v. J. C. Penney Co.,* 431 F. 2d 985 (6th Cir. 1970) and *Stephens v. City of Dayton, Tennessee,* 474 F. 2d 997 (6th Cir. 1973).

The exception carved out by the Sixth Circuit in the above cases to the general rule that jurors may not impeach their own verdict, is similar to a provision in Rule 606(b), Federal Rules of Evidence, which states:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except* that a *juror may testify* on the question whether *extraneous prejudicial information* was improperly brought to the jury's attention or *whether any outside influence* was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

Thus, Rule 606(b) adopts the previous position of the Sixth Circuit in permitting testimony concerning extraneous prejudicial information which was improperly brought to the jury's attention.

In *Kilgore v. Greyhound Corporation, Southern Greyhound Lines,* 30 F. R. D. 385 (E. D. Tenn, 1962), the Court was faced with a motion for a new trial. One of the bases upon which the motion was made was the alleged miscon-

duct of a juror who allegedly visited the scene of the accident, conducted an experiment to determine the authenticity of facts adduced from the witness stand and then sought to influence his fellow jurors with the conclusions he had reached. This motion for a new trial was supported by the affidavits of two (2) jurors, one of whom stated that the statements made by the experimenting juror had no effect on him, while the other juror's affidavit was silent as to any effect which the extraneous information had upon her. The Court, in recognizing the rule adopted and enforced by the Sixth Circuit in *Stiles, supra,* determined that:

> "In the case at bar the court had no way of ascertaining the truth of the matter without allowing a limited departure from the general rule. The court felt that the least public injury would result in determining from the allegedly offending juror the facts as to the nature and extent of his purported misconduct, because in this way the court could appraise the character of the extraneous influence on the jury and decide whether it was of such nature as might have reasonably been prejudicial to the plaintiff Kilgore. The court perceived its duty to be the ascertainment of whether the verdict reached by the jury was in any other way than by a conscientious observance of the oath each juror took to decide the case well and truly on the law and the evidence." *United States v. Brandenburg,* C. A. 3rd, 162 F. 2d 980, 983.

The Court continues in its opinion at 30 F. R. D. 388-389:

> "This juror also admitted that he undertook to recount his experience the following day when all the jurors had reassembled to continue their deliberations; whereupon, the jury foreman immediately reminded him that he was not to bring in evidence from outside the courtroom; that he should not consider such himself; and that all the jurors should disregard what the

> Juror Deal had said and not consider such extraneous matter in arriving at their verdict. Deal stated flatly that his excursionary experiences did not influence his own verdict; and of the two affidavits submitted by counsel to impeach the jury verdict, one flatly states that Deal's statement, 'Would have no effect on me,' while the other affiant is silent on the question of whether such improper discussion had influenced her vote against the plaintiff."

The Court in *Kilgore* determined that there are instances when, in order to determine whether extraneous information was prejudicial to a party, it is necessary to make an inquiry not as to the effect of the extraneous information but whether there was *any* effect at all.

Rule 606(b) prohibits a juror from testifying as to any matter or statement occurring during the course of jury deliberations or to the effect of anything upon his or any juror's mind influencing him to assent to or dissent from the verdict. What the rule attempts is to prevent inquiry into the mental processes of the jury in reaching a verdict. As stated in the "Notes of Advisory Committee on Proposed Rules" with regard to Rule 606(b):

> "Under the Federal Decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other features of the precess."

Consistent with the approach taken by the Court in *Kilgore, supra,* while this Court should adhere to the provisions of Rule 606(b), it is the belief of this defendant that since an inquiry as to whether "extraneous prejudicial information was improperly brought to the jury's attention" there must be an inquiry is prescribed by Rule

606(b), to determine whether the information was in fact prejudicial. To simply limit the inquiry to an examination of extraneous information would be to disregard Rule 606(b). For these reasons, defendants submit that this Court, in analyzing Rule 606(b) in view of pre-Rule 606(b) decisions within the Sixth Circuit and in the interests of justice should inquire and permit the jurors to respond as to whether any alleged extraneous information brought to their attention had *any* effect. The Court should not permit inquiry into the *specific* effect any extraneous information had.

This case involves allegedly extraneous prejudicial information and consequently falls under one of the two exceptions expressed in Rule 606(b) which permit a juror to testify on whether that allegedly extraneous prejudicial information was brought to the *jury's* attention. It has not been alleged in any of the affidavits or motions filed by plaintiffs that there was an outside influence which was improperly brought to bear upon any juror. The latter was the situation in *Krause v. Rhodes*, 570 F. 2d 563 (6th Cir. 1977), in which plaintiffs in this case have placed considerable reliance in their motion for a mistrial. That case dealt only with an alleged threat to a juror which was communicated at some point by the Court to the entire jury. The Sixth Circuit found that the Court should have individually interrogated each juror to see if this threat would have any effect on his continued presence as a juror in the case. *Krause*, since it involved an outside threat to one or more jurors (which threat was communicated to all jurors) does not address itself to the issue in the case at bar, whether extraneous prejudicial information which is brought to the jury's attention.

There are several cases which have dealt with extraneous information supplied by one of the jurors in a particular case. In *United States v. Marques,* 600 F. 2d 742 (9th Cir. 1979), four (4) individuals were on trial, having been charged with conspiracy to manufacture methamphetamine. One of the defenses consistently raised to the conspiracy charge was that the defendants did not know each other. Following trial and a conviction against appellants, an affidavit was presented by appellants stating that one juror, stated that she had observed four (4) of the criminal defendants getting into a car together during a Court recess. The Court of Appeals found that the affidavit and other supporting testimony was not grounds for further hearings by the District Court:

> "It does not say that the information was passed on to *all the other jurors,* that it was discussed, or that it was even considered by the jurors in their deliberations. In light of this *bare bones assertation* and the fact that appellants had the burden of persuading the trial court that the allegation warranted a new trial, or at least further inquiry, we cannot say that the court below abused its discretion in rejecting appellants' motion." *Id.,* at 747.

Similarly, in *United States v. Eagle,* 539 F. 2d 1166 (8th Cir. 1966), the Court refused to allow the defendant to subpoena and examine jurors. An affidavit by an attorney alleged that one juror realized during the course of the trial that the defendant had been charged with the shooting of two (2) other FBI agents in an unrelated incident. The Government presented the affidavit of the juror in question who admitted that during the trial he had speculated that the defendant was one of the men

charged in the FBI deaths. However, in his affidavit the juror stated that he did not discuss the speculation with any other juror and that it *did not affect his own decision in the case.* The Court of Appeals for the Eighth Circuit determined that:

> "Appellant's argument ignores a crucial fact: no contention has been made that Juror Long voiced his suspicions about appellant's identity *in the jury room.* In fact, by affidavit Long denies mentioning his speculation. This is fatal to appellant's position." *(Emphasis added)* 539 F. 2d at 1170.

The above cited cases require that any allegedly extraneous prejudicial information be brought to the jury's attention before it will be the subject of inspection by the Court. This is also the requirement of Rule 606(b) which specifically speaks of *the jury.* This is in contrast to the same rule as applicable to outside influences which are improperly brought to bear upon *"any juror."* It would seem from the drafting of Rule 606(b) itself and the cases which have relied upon it that allegedly extraneous prejudicial information (1) must be passed on to all other jurors or at least a substantial majority of them; (2) that is discussed by the jurors; or (3) considered by the jurors in their deliberations, *United States v. Marques,* 600 F. 2d 742 (9th Cir. 1979).

In light of these cases, defendant submits that this Court should question each juror concerning what information was passed to each individual juror, whether any discussions were had, the times of such discussions, and whether any of these discussions occurred during the jury's deliberations. In addition, if there were discussions, defendant submits that this Court must question

each juror as to the substance of each discussion, as only then can the alleged prejudicial effect be shown. In support of this last request by defendant, is *United States v. Duncan,* 598 F. 2d 839 (4th Cir. 1979), wherein the foreman of the jury, upon finding the defendant guilty, mentioned that one member of the jury during deliberations had been arguing Webster's definition of "motive" and intent. The foreman immediately told the jury that they were to rely on the Court's instructions and not on the dictionary definitions. Because of the totality of the circumstances and the fact that this misconduct was quickly remedied by the jury foreman, the Court held that it was not prejudicial to the defendant. 598 F. 2d at 866. The Court continues at 598 F. 2d 866 in saying:

> "The circumstances in which juror misconduct can occur are probably as varied as all of human experience. We have followed the view that the district court may deal with such claims as it feels the particular circumstances require and have only reversed for abuse of discretion."

Defendants would request this Court to use that discretion in inquiring of the jurors;

(1) whether any discussions took place;

(2) the content of any such discussions; and

(3) whether these discussions or any extraneous information had *any* effect on their deliberations (but no inquiry as to *the* effect it had).

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